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FEDERAL AND STATE FISH AND WILDLIFE REGULATIONS AND OTHER PERTINENT CALIFORNIA LAWS

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ABSTRACT: Working knowledge of Federal and State Fish and Wildlife regulations and other laws are critical for today's commercial applicator in the vertebrate pest control business. The everchanging focus on environmental protection, endangered species considerations, occupational health and safety, and animal rights have put vertebrate pest control operators in the precarious position of correctly interpreting the steady stream of laws and regulations passed by government. The consequences of failing to stay abreast of these changing regulations and correctly interpreting them can lead to very costly fines and possible imprisonment. Maintaining close contact with the many agencies that regulate the pest control industry and their enforcement personnel is essential to navigating and promoting a successful, long-term business in today's hostile, anti-business environment.

KEY WORDS: vertebrate pest, animal damage control, control methods

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INTRODUCTION

The enactment, interpretation and enforcement of government regulations pertaining to all facets of business activity continue to grow and change at a prolific rate. Observed from the business person's perspective, federal laws, state regulations and local ordinances create a maze of obstacles that require careful negotiation, often with the potential for ruinous consequences.

Today's business decision makers are increasingly burdened with environmental and workplace regulatory compliance laws, none of which can be ignored. Large corporations retain full time legal consultants whose prime functions are to interpret regulations and provide advice to decision makers on how best to negotiate regulation pitfalls.

A large percentage of businesses, however, fall into the small business category with fewer than 50 employees and are just as responsible for interpreting and implementing laws and regulations, most without the help of a full-time staff devoted to this express purpose. Many small business operators, therefore, unknowingly work in violation of one or more of the thousands of laws that regulate business activity.

If you don't think this is the case, look at the quickly growing "regulation compliance" industry that provides updated federal and state mandated labor posters, "employee right to know" kits and other information for government mandated workplace programs.

The effect of broad based business regulations is only compounded by industry specific regulation. The pest control industry, in general, is a perfect example. This industry is made up of a diverse group of businesses, researchers and regulators who oversee the development, production and application of chemicals and devices targeted toward a wide range of pests every year.

No matter which branch of pest control you are in, the layers of regulation are thick. The manufacturing branch faces very stiff opposition from federal and state Environmental Protection Agencies (EPA) to register new or existing products. Researchers testing the toxicity and efficacy of chemicals for pest control are losing the use of live test animals due to misguided regulations resulting

from nonscientific-based public opposition. Pest control operators and applicators are subject to more stringent regulations requiring careful evaluation of operational business procedures and sale of products to avoid potential fines and possible imprisonment.

The vertebrate pest and animal damage control branch incorporate even more regulation. This branch of pest control operates in areas that are regulated by the United States Fish and Wildlife Service (USFWS), United States Department of Agriculture (USDA-APHIS/ADC), United States Forest Service (USFS), Bureau of Land Management (BLM), United States Army Corps of Engineers (USACE), State Departments of Fish and Wildlife, State Departments of Agriculture and the Humane Society.

The regulations governing vertebrate pest control operations are numerous, complex and almost overwhelming. Due to the number of government agencies involved in regulating the pest control industry, each agency must be contacted to request information and regulations. Following is a basic, "must-have" reference list of sources necessary for any vertebrate pest control business:

1. *California Employer's Guide. A Handbook of Employment Laws and Regulations*, contact Summers Press, Inc., (800) 743-6491.
2. *California Animal Laws Handbook*, contact State Humane Association of California, (408) 647-8897.
3. *Vertebrate Pest Control Handbook*, contact California Department of Food and Agriculture, (916) 654-0768.
4. *Prevention and Control of Wildlife Damage*, contact University of Nebraska Cooperative Extension, (402) 472-2188.

A useful way to approach the subject of pertinent laws is to discuss site specific jobs where the preeminent regulations will determine your mode of operation.

The market share of each branch of pest control directly drives the amount of funding and effort that is put into research, product development and training.

The market share in the vertebrate pest control industry is small in comparison to that of the other branches of the pest control industry. In turn, the capital outlay required for vertebrate pest research, product development, label registration and end user products are high compared to the market profit potential. In a business climate where market force economics and government regulations frequently collide, it is easy to see the circumstances that will dictate corporate direction. Without a doubt, the direction for the best profit with least amount of regulation and overhead will be pursued. Unlike the other branches of pest control where manufacturers are developing competing types of control products for individual pests, the vertebrate pest control industry is suffering from a lack of competitive development in broad range of products.

Vertebrate pest control operators in California are feeling the effects of this problem directly. For example, the manufacturer of Avitrol has not renewed their label registration in the state of California because CalEPA does not recognize FedEPA reregistering data. The manufacturer looking at the bottom line will immediately see that spending more money on concurrent efficacy data to satisfy a hostile government agency is not worth the profit potential. In a market niche where it is tough to make a decent profit to keep research going on current products, let alone new products, the choice to bypass the California market is easy to see. The continuing loss of acute toxicants for vertebrate pest control is a trend that may not stay in California.

In this disturbing age of overblown environmental activism, too many key legislators are caving in to non-scientific rhetoric and passing very dangerous legislation which ties the hands of researchers and the pest control industry to maintain a healthy living environment for us all.

BUSINESS PRACTICES

The safest approach for working in a heavily regulated industry with a duplicity of government overseers is to stay focused on business and marketing practices so that you can also stay focused on the regulations that govern your field of operations.

Survival of a business specializing in vertebrate pest control requires that the operator become highly focused in terms of species, application and operational techniques, relative to market niche and market share. A focused business approach is one way to stay on top and in tune with the regulations and maintain personal contact with key regulators.

A focused approach also creates the necessity that a company take time to develop specialized operating skills and application tools for capturing market niches with the profit potential required to support the business. Focusing mandates a high priority for creative time toward developing field applications.

The downside of a highly focused approach toward conducting business is that the company must be willing to sacrifice sales outside the focus area. Focusing always requires sacrifice (loss of work to competitors). Over the long haul, the focused approach pays off for any business when combined with an equally focused marketing strategy built from sound advertising tactics.

Obviously, a focused approach requires patience, tenacity, faith, and a willingness to expand skill levels. Slow, steady growth stimulates a healthy, long-term, stable base of operation from which a company will preempt weak competitors and become a dominant player in the marketplace. History points out, however, that the financially successful company tends to branch out, lose focus, and eventually weaken its grip on the substantive markets, products or service that brought initial success.

The emphasis on business practices in relation to laws and regulations force a company to focus its energy toward improving business standards and discovering new market niches.

FIELD APPLICATION

The following examples will illustrate some of the interaction that is required to conduct vertebrate pest control operations in the State of California.

Fresno County, located in the San Joaquin Valley of Central California, has one of the highest concentrations of endangered species of any county in the U.S. It is also one of the most intensely farmed counties in the U.S.; consequently, it is monitored closely by several government agencies. Knowledge of the written regulations and personal contact with agents that interpret and enforce the regulations is very important.

In some instances, a gopher control job using the fumigant aluminum phosphide (Fumitoxin) becomes complex because of the overlapping range of multiple endangered species. The San Joaquin Kit Fox (*Vulpes macrotis*) and the Blunt Nosed Leopard Lizard (*Gambelia silus*) have overlapping ranges. In essence, you should know if either of these species is on or within one mile of your treatment site. Regardless of what the special agents tell you, they are not responsible if your Fumitoxin application violates any of the regulations.

The use of Fumitoxin for gopher control is a good example for discussion. The label states, "Please consult Local, State, and Federal Game Authorities to ensure that endangered species do not inhabit the area proposed for treatment." "Use of this product in the above areas is prohibited without first contacting and obtaining permission from the Endangered Species Specialist in the regional office of the U.S. Fish and Wildlife Service (USFWS) nearest you."

First, the USFWS Endangered Species Specialist in Sacramento is contacted and notified that Fumitoxin is being considered for gopher control in an almond orchard. The Endangered Species Specialist will request further information which will include a copy of the label, site map, area map, list of applicators, resumes of the applicators, training procedures for the applicators, and explicit details of how applicators will determine whether a burrow is a gopher burrow or that of a kit fox or blunt-nosed leopard lizard.

After this information is submitted, your application to use Fumitoxin is considered by a USFWS committee. If you are approved, then you are required to notify local USFWS agents, California Department of Fish and Game, FedEPA, and CalEPA if any unexpected wildlife mortality results from your use of Fumitoxin. They will determine if there are any known burrow sites of endangered species within one mile of the treatment area.

If there are known burrow sites within one mile of the proposed treatment area, you may not use Fumitoxin at that site. If the California Department of Fish and Game (CDFG) approves the use of the Fumitoxin, you will then contact the County Agricultural Commissioner's office to ensure that you are registered in the county to apply restricted use materials and, specifically, that you have a restricted use materials permit with aluminum phosphide plainly listed.

Then you must obtain a written recommendation from a Pest Control Advisor (PCA) and then submit a Notice of Intent (NOI) to the county more than 24 hours before treatment time.

At the end of the month you are required to submit a Monthly Summary Pesticide Use Report to the county informing them of how many applications and the amount of Fumitoxin that was applied during the month in their county.

Next, show up at the job site on time, on the correct day, with a clean truck and all the safety gear as required by the label. Above all, do not deviate from any of the label restrictions.

If one or more of the regulatory agents wants you to do something that is more restrictive than what the label calls for, give it careful consideration.

Feral cats (*Felis domesticus*) are vertebrate pests that cause problems for food packing or processing plants, for example. Feral cat control can create a number of problems for the pest control operator if coordination with the local Humane Society (HS) is not done properly.

That is where the California Animal Laws Handbook will come in handy. Know ahead of time what you can and cannot do with feral cats. Then contact your local Humane Society office, explain the situation, and ask their advice on where to take the cats after they have been live trapped. Be careful and thoughtful with the manner in which you transport the cats. Avoid keeping them overnight. If you must overnight them, make sure they have food and water and are in an approved holding cage.

The pest control operator that scoffs at the California Animal Laws will have "eternal cat nightmares," if feral cats are not handled with delicate diplomacy within the limits of the law. The same holds true of any wildlife that has been live trapped and will be transported to a holding center.

Let us discuss an issue where knowledge of the California Animal Laws and the Migratory Bird Treaty Act will help you avoid stressful confrontations. A customer from an exclusive lake front housing project calls to complain about the ducks and geese eating the high dollar landscape and leaving little piles of poop everywhere, which in turn are being tracked inside by the kids and pets. If your government agencies were not so restrictive to private enterprise, you might be able to use alpha chlorolose. Since alpha chlorolose is not labeled and registered for use by private enterprise you are going to test the first rule of free market economics, which is, "Will the customer pay enough for me to risk my business to capture and remove a few waterfowl?" This job may be one of those that you sacrifice to your competitors. If you cannot resist the work, commit only to a carefully worded, signed contract.

Now the fun begins. Contact the local USFWS to see if a depredation permit can be obtained. A permit is usually very hard to obtain the first time around. The USFWS usually recommends calling USDA-APHIS/ADC to have them do the control work (they get to use alpha chlorolose).

Generally, the folks at USDA-APHIS/ADC are busy on more important calls and will not be able to help (they know what a hassle it will be). The USFWS also likes to have cultural practices employed in cases like this before agreeing to issuing a depredation permit. You call the home owners association to recommend they implement a no feeding policy and ban residents from releasing domestic waterfowl. They agree to the recommendation, but acknowledge that the problem still exists and they want all the domestic waterfowl removed. You notify the USFWS that you will not be trapping native (wild) waterfowl and outline your plan, which they will most likely approve. You then call the local CDFG office to keep them informed and to find a rescue shelter for the domestic waterfowl.

Make personal contact with the folks at the rescue shelter to make sure that your live trapping and methods of transportation and handling will meet their expectations. Make sure that their expectations are sanctioned by the Humane Society. For example, domestic or native waterfowl must not be exposed to wind or hot sun during transportation. Once you have established your transportation procedure, check it out again with someone from the local Humane Society. If not, you run the risk of discovering that a group from the HS is waiting at the destination site to inspect the condition of the ducks. This is not a pleasant experience, nor is the resulting bad press if you have mishandled the birds in any way.

Waterfowl present a challenging problem in situations where netting is used to exclude them from fish farm raceways or from toxic containment basins. The use of netting as an exclusion barrier is a viable control technique, but occasionally waterfowl or shore birds become entangled in the netting. Some birds die of exhaustion attempting to free themselves. Some species during seasonal migration are so driven by thirst and a need to rest that they die of exhaustion on top of the netting without becoming entangled. At locations where this is known to occur, a trained rescue team, that is on alert, can prevent these accidental deaths.

The Migratory Bird Treaty Act (MBTA) does not expressly prescribe methods for preventing "accidental take." The USFWS uses their interpretation of the MBTA to "encourage" businesses to modify their operations to reduce or prevent hazards to wildlife. There is provision for a \$10,000 fine per bird and imprisonment for those individuals or companies with flagrant violations. Some states also have laws or local ordinances requiring that some type of physical barrier be present to exclude waterfowl and shorebirds.

The latest development toward excluding birds from containment basins is the use of four-inch diameter, black, HDPE plastic balls, floating on the surface of the liquid. These Bird Balls™ camouflage the liquid and become an impenetrable barrier for birds that may try to

land. The Migratory Bird Treaty Act is clear about what can and cannot be done regarding species covered in the Act. Always contact the local USFWS and CDFG office to discuss any work you want to do with waterfowl. Be persistent until you find someone that is interested in what it is you want to do.

The regulations regarding the control of bats in the State of California are unclear. There are no pesticides registered for use in the control of bats. Exclusion is the professional option and works very well on bats. Schedule work before young are born or after they are able to fly. The California Department of Health Vector Control staff can help you with the timing. Harassing or entrapping the bats during the exclusion process may be interpreted as a violation of the California Animal Laws.

Cliff swallows are protected by the Migratory Bird Treaty Act and, therefore, require special consideration before any work is done that may be regarded as a violation of the Act. Removal of their mud nests, for example, is permitted as long as there are no eggs or young in the nest. Removal of completed nests late into

the nesting season is a touchy situation and should be avoided. Nest removal should be started well before the swallows return from their wintering grounds. Exclusion of prime nesting areas is the only effective method for long term control.

The local USFWS office should be contacted at the beginning of each swallow nesting season to determine the current interpretation of the Migratory Bird Treaty Act regarding the removal of swallow nests.

CONCLUSION

The best advice for any vertebrate pest control operator is to develop contacts in the various agencies that regulate your work. Seek their interpretation of the regulations so that you will be covered by the government regulators nearest to your work site. This approach will help you to avoid driving to a job site thinking you are covered by the Federal laws only to discover that a local mandate has a different spin on interpreting your guidelines.